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KHALIQ MEHTAB MOHD ISHAQ & ANOR
v. DEWAN UNDANGAN NEGERI PULAU PINANG & ANOR

HIGH COURT MALAYA, PULAU PINANG
AZIZAN MD ARSHAD JC
[ORIGINATING SUMMONS NO: PA-24NCvC-709-10-2020]
B 20 JANUARY 2023

Abstract – *The guidance from the Federal Court must always be followed and binding, that is, the court must always give recognition to the doctrine of separation of powers. The courts have no power to interfere with the internal management of Parliament or any State Legislative Assembly.*

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D ***CONSTITUTIONAL LAW:*** *Constitution – State Constitution – Penang State Constitution ('PSC'), art. 14A – Eligibility or disqualification of members of State Legislative Assembly – Motion to vacate seats held by members of State Legislative Assembly – Whether art. 14A of PSC contrary to art. 10(1)(c) of Federal Constitution*

E On 9 May 2018, the 14th Penang State Election took place concurrently with the 14th General Election of Malaysia ('GE14'). During the GE14, there was a coalition of political parties known as Pakatan Harapan ('PH'), comprising Parti Keadilan Rakyat ('PKR'), Democratic Action Party ('DAP'), Parti Amanah Negara ('Amanah') and Parti Pribumi Bersatu Malaysia ('Bersatu'). The PH coalition did not manage to obtain the
F necessary approval to be registered under the Societies Act 1966. Hence, during the entirety of GE14, PH remained unregistered. PH then announced that all of its candidates would contest in GE14 under the logo of its component party. In February 2020, there was a revolt within PH which ultimately resulted in, *inter alia*, the formation of a new Federal Government led by Perikatan Nasional ('PN') which was a coalition of political parties
G of Bersatu, UMNO and PAS. Due to the departure of Bersatu and various members of the State Legislative Assemblies ('SLA') from the PH coalition, the Chief Minister of Penang informed the media that the Penang Government would move a motion under art. 14A(1) of the Penang State Constitution ('PSC') to vacate the seats held by the plaintiffs. The plaintiffs
H filed originating summons ('encl. 1') to seek a declaration that art. 14A of the PSC was null and void under art. 4(1) of the Federal Constitution ('FC') because it was in conflict with art. 10(1)(c) of the FC. In encl. 1, the plaintiffs sought (i) a declaration that art. 14A of the PSC was contrary to art. 10(1)(c) of the FC; (ii) a declaration that any motion approved by the first defendant
I for the plaintiffs to vacate their seats pursuant to art. 14A of the PSC was void and invalid; (iii) the defendants be injuncted from, *inter alia*, tabling, voting

and approving any motion pursuant to art. 14A of the PSC; and (iv) a declaration where, in the event a motion tabled under art. 14A of the PSC was approved by the first defendant, the plaintiffs could claim for their seats as members of the SLA.

Held (dismissing encl. 1):

(1) The court would not interpret whether art. 14A of the PSC was oppressive or prevented the plaintiff's freedom of speech or from arguing in the SLA. This was because the plaintiffs' pleaded question was 'whether art. 14A was contrary to art. 10(1)(c) of the FC' which had been answered by the Federal Court. What else was left for this court to interpret otherwise? Further, the reliefs requested were mainly irrelevant or premature because it had already been decided and there was also a future one which could be prayed because the rights were fully vested in the defendants. This court did not have the jurisdiction and power to do so at this time and it could only be applied after the decision is made by the defendants under art. 14A of the PSC. (paras 72 & 73)

(2) This court could not make any decision that will exceed the jurisdiction of this court. Any issue related to the eligibility or disqualification of a member of the SLA who had been elected through a valid election process is under the jurisdiction of the SLA, as stated in the State Constitution. In this case, it is under art. 13 of the PSC. For this case, it involved art. 14A of the PSC which was for the first defendant to make decisions. Applying the *ratio* in *Teng Chang Khim (Appealing As Speaker of Selangor State Legislative Assembly) v. Badrul Hisham Abdullah & Anor,* the applicability of art. 14A of the PSC is within the exclusive jurisdiction of the second defendant and could not be interfered with by the courts. Even if the courts could intervene, this could only be done and referred to the court after a decision is made by the second defendant. In the present case, no decision had been made by the second defendant. (para 76)

(3) This court could not grant an injunction against the first defendant which had the effect of preventing the defendants from exercising the powers and jurisdiction provided to them under the PSC. Further, the court could not prevent the second defendant from referring or tabling any motion related to the plaintiffs because this would interfere with the defendants' affairs under the PSC. This immunity arose from the doctrine of separation of powers between the three principal organs of the Government, namely the Executive, the Legislature and the Judiciary. (para 76)

Case(s) referred to:

Datin Seri Rosmah Mansor v. PP & Another Appeal [2022] 4 CLJ 523 CA ***(refd)***
Datuk Syed Kechik Syed Mohamed v. Government Of Malaysia & Anor [1978] 1 LNS 44 FC ***(refd)***
Dewan Undangan Negeri Selangor & Ors v. Mohd Hafarizam Harun [2016] 7 CLJ 143 FC ***(refd)***
Iki Putra Mubarrak v. Kerajaan Negeri Selangor & Anor [2021] 3 CLJ 465 FC ***(refd)***
Jaafra Ab Lateh v. Mohd Irwan Abdullah [1996] 2 SLR 201 ***(refd)***
Kordial Kor Kundang Singh v. EC Controlled Demolition Sdn Bhd & Ors [2002] 6 CLJ 295 HC ***(refd)***
Lim Guan Eng v. Ruslan Kassim & Another Appeal [2021] 4 CLJ 155 FC ***(refd)***
Md Su'aimy Wahab lwn. Abdul Rahman Mohamad & Yang Lain [2022] 1 LNS 1199 HC ***(refd)***
PCP Construction Sdn Bhd v. Leap Modulation Sdn Bhd; Asian International Arbitration Centre (Intervener) [2019] 6 CLJ 1 FC ***(refd)***
Ribaru Bina Sdn Bhd & Anor v. Bakti Kausar Development Sdn Bhd & Anor [2007] 1 CLJ 552 CA ***(refd)***
SPNB Aspirasi Sdn Bhd lwn. Chimonief Sdn Bhd [2022] 3 CLJ 581 CA ***(refd)***
Syed Iskandar Syed Jaafar v. Kerajaan Malaysia & Ors [2023] 1 CLJ 642 HC ***(refd)***
Teng Chang Khim v. Badrul Hisham Abdullah & Anor [2017] 9 CLJ 630 FC ***(refd)***
The Speaker Of Dewan Undangan Negeri Of Sarawak Datuk Amar Mohamad Asfia Awang Nassar v. Ting Tiong Choon & Ors And Other Appeals [2020] 3 CLJ 757 FC ***(refd)***
Tun Dr Mahathir Mohamad & Ors v. Datuk Azhar Azizan Harun & Ors [2021] 3 CLJ 852 HC ***(refd)***
YAB Dato' Dr Zambry Abd Kadir & Ors v. YB Sivakumar Varatharaju Naidu; Attorney-General Malaysia (Intervener) [2009] 4 CLJ 253 FC ***(refd)***
Yew Wan Leong v. Lai Kok Chye [1990] 1 CLJ 1113; [1990] 1 CLJ (Rep) 330 SC ***(refd)***

Legislation referred to:

Constitution (Amendment) (No. 3) Act 2022, s. 6
Courts of Judicature Act 1964 s. 84
Federal Constitution arts. 4(1), 10(1)(a), (c), 49A, 52, 72(1), Eighth Schedule
Penang State Constitution, arts. 13, 14(3), 14A, 14A(1)(a), (3)
Selangor State Constitution, arts. 69, 70(5)

For the applicants - DP Naban, Rosli Dahlan, Zunurajriya Muhamad Zukri & Thenesh Anbalagan (PDK); M/s Azlina Mehtab & Assocs
For the respondents - Malik Imtiaz, Surendra Ananth, Khoo Suk Chyi & Wong Ming Yen; M/s Surendra Ananth

Reported by Lina E

JUDGMENT
(encl. 1)

Azizan Md Arshad JC:

Introduction

[1] The originating summons ("encl. 1") was originally premised on a violation of art. 10(1)(c) of the Federal Constitution ("FC") and the decision of the Supreme Court in *Nordin Salleh*.

[2] The defendants filed an application to refer a constitutional question directly to the Federal Court pursuant to s. 84 of the Courts of Judicature Act 1964 ("CJA"). The defendants' application to refer the following question to the Federal Court:

> **Whether the art. 14A of the State Constitution of Penang is void for being inconsistent with the art. 10(c) of the Federal Constitution.**
> (emphasis added)

[3] This court has referred the question under s. 84 of the CJA 1964, and it has been decided by the Federal Court on 3 August 2022 that the amendment does not conflict with art. 10(1)(c) of the FC. This matter was sent back to the High Court to be disposed of based on the decision and in accordance with the provisions of the law. The Federal Court answered the question in the negative and overruled the decision in *Nordin Salleh* and decided that the summons should be disposed of "in accordance with the judgement of the Federal Court and otherwise according to law."

[4] Currently, there is an appeal against the decision of this court in relation to the amendment to encl. 1 which has not yet been decided by the Court of Appeal. In short, the amendment also has the same effect, that is, whether the amendment to art. 14A of the Constitution of the State of Penang ("PSC") will be contrary to art. 10(1)(a) of the FC which is to restrict the freedom of Members of Parliament from exercising their constitutional rights, namely freedom of speech.

[5] Referring back to the application of encl. 1 which has been fully heard, this court will now give the reasons why this court reached to a judgment. Parties are referred to as they were in High Court.

Facts Of The Case

[6] The first plaintiff (ADUN for Bertam) and the second plaintiff (ADUN for Teluk Bahang) filed the encl. 1 to seek a declaration that art. 14A of the (PSC) is null and void under art. 4(1) of the FC because it conflicts with art. 10(1)(c) of the FC. The prayers sought in the encl. 1 are as follows:

> (1) satu deklarasi diberi bahawa Fasal 14A Perlembagaan Negeri Pulau Pinang adalah bercanggah dengan Fasal 10(1)(c) Perlembagaan Persekutuan dan adalah tidak sah;
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> (2) satu deklarasi bahawa sebarang usul yang diluluskan oleh defendan pertama yang berupa untuk mengosongkan kerusi plaintif-plaintif sebagai Ahli Dewan Undangan Negeri (ADUN) bagi bahagian pilihan raya Bertam (N2) dan Telok Bahang (N40) menurut Fasal 14A Perlembagaan Negeri Pulau Pinang adalah tidak sah dan terbatal;
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> (3) oleh demikian, defendan pertama dihalang daripada membentangkan, mencadangkan, membahas, mengundi dan/atau meluluskan sebarang usul yang ingin dibentangkan, dicadangkan, dibahas dan diluluskan menurut Fasal 14A Perlembagaan Negeri Pulau Pinang;

(4) oleh demikian, defendan kedua dihalang dari membenarkan, memberi persetujuan, bersetuju dan/atau sebaliknya mengizinkan pembentangan, cadangan, pembahasan, undian dan/atau kelulusan sebarang usul yang dibuat dibawah Fasal 14A Perlembagaan Negeri Pulau Pinang dalam Dewan Undangan Negeri Pulau Pinang;

(5) satu deklarasi dalam keadaan dimana sebuah usul dibawah Perkara 14A Perlembagaan Negeri Pulau Pinang telah diluluskan oleh defendan pertama, dan akibatnya kerusi-kerusi Ahli Dewan Undangan Negeri (ADUN) plaintif-plaintif dikosongkan, plaintif-plaintif berhak untuk dikembalikan semula sebagai Ahli Dewan Undangan Negeri (ADUN) bagi kerusi Dewan Undangan Negeri Bertam (N2) dan Telok Bahang (N40) masing-masing dan untuk memohon relif-relif lanjut dan seterusnya;

(6) apa-apa relif lain diberi dan/atau perintah lain diberi yang dianggap oleh Mahkamah yang Mulia ini sebagai sesuai dan adil dalam keadaan-keadaan tersebut; dan

(7) bahawa kos bagi tindakan ini disediakan sebagaimana yang difikirkan sesuai dan adil oleh mahkamah yang Mulia ini.

Plaintiffs' Submissions

[7] On 9 May 2018, the 14th Penang State Election took place concurrently with the 14th General Election of Malaysia ("GE14"). At all material times, during GE14, there was a coalition of political parties known as Pakatan Harapan ("PH") comprising Parti Keadilan Rakyat ("PKR"), Democratic Action Party ("DAP"), Parti Amanah Negara ("Amanah") and Parti Pribumi Bersatu Malaysia ("Bersatu").

[8] The PH coalition, however, did not manage to obtain the necessary approval to be registered under the Societies Act 1966. Hence, during the entirety of GE 14, PH remained unregistered.

[9] On 6 April 2018, PH announced that all of its candidates will contest in GE 14 under the logo of its component party. Around February 2020, there was a revolt within PH which was popularly reported as the "Sheraton move" which involved, *inter alia*, Tun Mahathir's resignation as then Prime Minister, the subsequent departure of 11 members of Parliament from PKR, the departure of Bersatu from the PH coalition and also departure of various members of State Legislative Assemblies ("SLAs") who were previously part of the PH coalition.

[10] The Sheraton move ultimately, resulted in, *inter alia*, the formation of a new Federal Government led by Perikatan Nasional ("PN"), which is a coalition of political parties of Bersatu, United Malay National Organisation ("UMNO") and Malaysian Islamic Party ("PAS").

[11] Due to the departure of Bersatu from the PH coalition and also departure of various members of State Legislative Assemblies ("SLAs") who were previously part of the PH coalition, on 12 August 2020, the Chief

Minister of Penang, YAB Chow Kon Yeow, informed the media that the Penang Government will move a motion under art. 14A(1) of the PSC to vacate the seats held by the plaintiffs.

[12] On 5 October 2020, the PSLA informed the plaintiffs that a motion to vacate the plaintiffs' respective seats will be tabled in the upcoming PSLA meeting on 12 October 2020 ("the motion").

[13] On 7 October 2020, as a result of the impending motion to vacate their seats, the plaintiffs then filled three OS at the Penang High Court against the defendants. The plaintiffs sought, *inter alia*, that art. 14A of the PSC is invalid and void on the ground that it is unconstitutional.

[14] On 9 October 2020, the parties entered into a consent order where the defendants withdrew the motion to disqualify the assemblymen and undertook not to present any further motion in the PSLA unless the plaintiffs were given fourteen clear days' notice of such an intent, gave an undertaking not to table the motion until the disposal of the encl. 1 herein.

[15] On 26 January 2021, the defendants filed an application pursuant to s. 84 of the CJA 1964 to refer the constitutional question to the Federal Court ("the referral application").

[16] On 20 August 2021, the plaintiffs refiled the application for an injunction ("encl. 29") because the defendants gave notice of their intent to call for a special sitting to pass a motion in the PSLA to disqualify the plaintiffs.

[17] On 27 August 2021, the defendants entered an undertaking not to present any motion in the Penang State Legislative Assembly to disqualify the plaintiffs until the disposal of the encl. 1.

[18] It is clear that art. 14A(1)(c) of the PSC has two components for it to be triggered:

(i) the first part is that the assemblyman must be 'elected as a candidate of a political party'; and

(ii) the second part is that the assemblyman must 'resigns' or is expelled from, or ceases for any reason whatsoever to be a member of that party;

[19] This means that art. 14A of the PSC only applies to assemblyman who is a candidate of a political party where he/she is also a member of the political party. This must be the case, because for the provision to apply the assemblyman in question must resign, be expelled from or cease to be a member of 'that party' for which he/she was elected a candidate.

[20] In this particular case there are four difficulties:

(i) the Bersatu assemblymen are not and were not members of PKR;

(ii) the Bersatu candidates have never resigned, expelled or have ceased to have been members of Bersatu;

(iii) thirdly, they were never members of PKR and therefore cannot resign, be expelled from or based to be a member of PKR; and

(iv) therefore, on a plain reading and natural reading, the provisions of art. 14A of the PSC cannot attach to the Bersatu assemblymen.

[21] They have not left the political party they were elected on. They have not been expelled from the party they were elected on.

[22] While it is expected that the defendants will argue that Bersatu switched allegiances, that is not the purpose of art. 14A of the PSC. Article 14A of the PSC is to deal with the membership at a personal level of the member who was elected to the Penang State Assembly.

[23] Any other reading disenfranchises the public voters who voted for these assemblymen as Bersatu members. There is no way to tell otherwise what is the intent of the voters.

[24] In fact, it is clear and undisputed that Bersatu was part of a coalition of parties known as Pakatan Harapan. However, Pakatan Harapan was not even a registered political party for the purpose of the election.

[25] The only way to hold that art. 14A of the PSC applies to the Bersatu assemblymen is to hold that the Bersatu candidates stood as members of Pakatan Harapan and that when Bersatu, as a political party, left Pakatan Harapan, the assemblymen somehow ceased to be members of Pakatan Harapan. This makes a mockery of:

(i) the plain and ordinary meaning of the word "members"; and

(ii) the purpose of art. 14A of the PSC.

[26] It surely was not the intent of the provision that the decisions of political parties to change allegiances would result in a loss of their members seats as assemblymen.

[27] The principles of statutory and constitutional interpretation are such that the benefit of the doubt should be given to the citizens whose rights are being removed by the interpretation of the constitutional provision.

[28] The critical undisputed facts are that the plaintiffs were given the consent to use the logo of PKR during the election. On the facts of this case, it is clear that the plaintiffs have not left the political party they were elected on. They have not been expelled from the party they were elected on. It is clear that the intent of the framers was to prevent the ill of intentional party hopping which could give rise to destabilisation. It was not the intent of the PSLA to punish assemblymen who did not switch allegiances.

[29] This interpretation is supported by the exception that was created within art. 14A of the PSC itself. Those exceptions protect against the loss of "membership" by reason of the dissolution of the party or the resignation to take up the post of Speaker. This clearly is the suggestion of an

interpretation that requires an intent to switch allegiances or defect. An element of intent of conduct must be read into art. 14A of the PSC. This is consistent with the exception carved out in art. 14(3) of the PSC whereby no reason of the assemblyman's conduct they could be removed from their political party – either by being elected Speaker or their party being deregistered or dissolved.

[30] Article 14A of the PSC certainly should not apply the facts of this case, where these assemblymen are still Bersatu's members. This demonstrates the propensity for abuse of power in this case.

[31] To read the provision in any other way would result in a violation of the assemblymen's rights under art. 10(1)(a) of the FC to freely speak/ freedom of speech.

[32] The important point to note is that this proceeding arose because of the tabling of a motion in an upcoming PSLA meeting on 12 October 2020. The defendants cannot now argue that the Speaker is the decision maker of the issue pertaining to the plaintiffs' qualification or disqualification as it will render the motion redundant.

[33] This argument is an afterthought and an attempt to circumvent the subject matter of the encl. 1, *ie*, the applicability of art. 14A of the PSC. This Honourable Court has jurisdiction to decide the applicability of art. 14A of the PSC.

[34] The defendants have now raised art. 72 of the FC and argued that:

(i) the issue falls within the exclusive jurisdiction of the Speaker; and

(ii) this Honourable Court does not have the jurisdiction to decide on the matter.

[35] It is argued that this argument is inconceivable as the Federal Court in its decision for the reference dated 3 August 2022 expressly directed the High Court to proceed to continue with the pending proceedings. Therefore, the defendants cannot argue that this Honourable Court has no jurisdiction to decide the matter, contrary to the express directions of the Federal Court.

[36] Further, it was expressly stated by the defendants' counsel in his letter to this Honourable Court dated 4 August 2022 to dispose of the encl. 1 in accordance with the Federal Court reference decision. The defendants cannot be allowed to have contradicting positions in this ongoing legal suit.

[37] The issue of the preliminary question of whether this Honourable Court has jurisdiction to hear and/or decide the case was never raised by the defendants until now. As expressly agreed by the defendants' counsel in the last hearing, the only issue left to be determined by this Honourable Court is indisputable, which is the applicability of art. 14A of the PSC on the specific situations in which the plaintiffs are experiencing.

[38] The only issue before this court revolves around the interpretation of art. 14A of the PSC and its applicability to the plaintiffs. It is trite law that the Legislature makes the law, the Executive enforces the law, and the Judiciary interprets the law. As David Wong CJ in *The Speaker Of Dewan Undangan Negeri Of Sarawak Datuk Amar Mohamad Asfia Awang Nassar v. Ting Tiong Choon & Ors And Other Appeals* [2020] 3 CLJ 757; [2020] 4 MLJ 303 ("*Ting Tiong Choon*") stated:

> (169) This country is a constitutional democracy regulated, constricted and circumscribed by the Federal Constitution – the supreme law of the land and a document drafted meticulously and alert much thought and consideration by the founding fathers of the nation. Central for the Constitution is the doctrine of separation of powers which divides the institutions of government into three branches: The Legislature, Executive and Judiciary. The Legislature makes the laws; the Executive put the laws into operation; and the judiciary interprets the laws. This doctrine is the bedrock of a fair and responsible government providing a system where each branch checks and balances the others.

[39] Furthermore, it is crucial to revisit the key remaining declaratory and injunctive reliefs that are sought in this encl. 1 which are as follows:

> (a) A declaration that any motion passed by the first defendant purporting to vacate the plaintiffs' seats as State Assemblymen for the constituency of Bertam (N4) and Telok Bahang (N40) pursuant to art. 14A of the Constitution of the State of Penang is invalid, null and void;
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> (b) In consequence of the above declarations, that the first defendant be restrained by injunction from tabling, proposing, debating, voting upon and/or passing any motion purporting to vacate the plaintiffs' seats as State Assemblymen for the constituencies of Bertam (N4) and Telok Bahang (N40)) pursuant to art. 14A of the Constitution of the State of Penang;
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> (c) In consequence of the above declarations, that the second defendant be restrained by injunction from permitting, consenting to, acquiescing and/or otherwise howsoever allowing the first defendant to table, propose, debate, vote upon and/or pass any motion made under art. 14A of the PSC;
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> (d) In the event any motion purporting to vacate the plaintiffs' seats as State Assemblyman for the constituencies of Bertam (N4) and Telok Bahang (N40) pursuant to art. 14A of PSC is passed by the first defendant, that the second defendant, whether by himself or by his servants and/or agents be restrained by injunction from notifying the Election Commission of the occurrence of any vacancy in the Penang Legislative Assembly seat for the constituencies of Bertam (N4) and Telok Bahang (N40).

(e) A declaration that in the event any motion pursuant to art. 14A of the PSC is passed by the first defendant and the plaintiffs' Penang Legislative Assembly seats are vacated as a consequence, the plaintiffs are entitled to be reinstated as the Penang State Assemblyman for the constituencies Bertam (N4) and Telok Bahang (N40).

[40] The reliefs sought in sub-paras. 39(a) and (e) are declaratory in nature. As recognised by the Federal Court's judgment in *Datin Seri Rosmah Mansor v. PP & Another Appeal* [2022] 4 CLJ 523; [2022] 3 MLJ 601:

[73] In the light of the above authorities, we are of the view that the court's jurisdiction to grant declaratory relief is not solely derived from the Specific Relief Act 1950 but also emanates from its inherent jurisdiction.

[41] Further, the defendants also argued that the court can only intervene after a decision is made by the second defendant. This argument is without merit because the Federal Court had previously held in *Datuk Syed Kechik Syed Mohamed v. Government Of Malaysia & Anor* [1978] 1 LNS 44; [1979] 2 MLJ 101 that a declaratory order can be used when a future right might be interfered with:

A declaratory order will eliminate anxiety of having to live under a cloud of fear. In granting a declaration the court has to consider the utility of the declaration claimed and the usefulness of the declaration on the one hand as against the inconvenience and embarrassment that may result on the other hand. As to the determination of future right its importance for certain purposes is not in doubt, particularly when a mere declaration is usually the only remedy. Zamir on the Declaratory Judgment at page 206 states:

> It is not uncommon/or persons to confront an allegation that at some future rate they will become liable to another, or that they will not have a certain right which they expect fa come into existence, or that their existing right will then expire. They may in such circumstances bring a declaratory action to remove the cloud from their future rights.

[42] With regards to sub-paras. 39(b) to (d) above, they are merely consequences flowing from the declarations sought in sub-paras. 39(a) and (e), which set the limits or framework in which the Speaker can decide on the disqualification of the plaintiffs. The decision-making power remains with the Speaker and not the court.

[43] Therefore, the defendants cannot argue that this Honourable Court "cannot predetermine this issue" as the essence to this encl. 1 is to interpret the correct reading of art. 14A of the PSC to assess its applicability to the plaintiffs, not to interfere with any decision of the State Assembly that is correctly made within the legal framework of art. 14A of the PSC.

[44] Moreover, art. 14A of the PSC has never been tested since it was enacted. When *Nordin Salleh* was the established law in our country, art. 14A of the PSC remains unconstitutional until the Federal Court

reference decision in August 2022. Thus, it is necessary for this Honourable Court to interpret the correct meaning of art. 14A of the PSC at this juncture. Article 72 of the FC does not oust this Honourable Court's jurisdiction to decide the issue in encl. 1.

[45] The defendants argue that art. 72 of the FC gives the Legislative Assembly exclusive jurisdiction to decide the qualification and disqualification of an assemblyman. However, this jurisdiction should not be deemed as unlimited and unfettered. The fact that the grounds for disqualification are expressly listed down implies that the decision to disqualify an assemblyman must be done within the legal framework. This means an assemblyman must only be disqualified if what he does or omits to do falls squarely under any of the grounds for disqualification.

[46] The real issue before this Honourable Court is whether the defendants were wrong for tabling a motion under art. 14A of the PSC, which concerns the "change of political parties."

[47] The defendants cited the Federal Court's decision in *Teng Chang Khim v. Badrul Hisham Abdullah & Anor* [2017] 9 CLJ 630; [2017] 5 MLJ 567 ("*Teng Chang Khim*") as an instructive authority. However, it is distinguishable from our current case as it does not concern the correct interpretation of the grounds of disqualification. In *Teng Chang Khim* (*supra*), it was clear that the plaintiff was absent from the State Legislature Assembly meeting for more than six months without leave of the Speaker and the relevant State Constitution expressly states that the Speaker has to declare the vacancy of the seat. Therefore, the Speaker was acting within the prescribed limits of the State Constitution. In fact, the Federal Court in *Teng Chang Khim* explained the precondition before incurring art. 72 of the Federal Constitution is as follows:

> [49] On appeal, the Court of Appeal upheld the decision of the High Court. On further appeal this court in dismissing the appeal, amongst others, held:
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> > [46] As regards this appeal, it is our judgment the assembly must act within its constitutional and legal powers before the protection provided for by art. 72(1) can arise, before passing a resolution of an act of contempt having been committed beyond the walls of the assembly. The assembly's powers are limited by the Selangor State Constitution ...
> >
> > [47] A careful perusal of the provisions of the Schedule in the Selangor State Constitution, which confers the power and privileges of the assembly, reveal no provision that provides for contempt committed outside the legislative assembly. The defendants too have failed to show which provision in the schedule was relied on to pass the resolution. The assembly has therefore exceeded the jurisdiction provided for in the Schedule.

[48] As in *YAB Dato' Dr Zambry Abd Kadir & Ors v. YB Sivakumar Varatharaju Naidu; Attorney-General Malaysia (Intervener)* [2009] 4 CLJ 253; [2009] 4 MLJ 24, on the facts, *Dewan Undangan Negeri Selangor & Ors v. Mohd Hafarizam Harun* [2016] 7 CLJ 143; [2016] 4 MLJ 661 case is also distinguishable from the present case. In both cases, the respective Legislative Assemblies had exceeded its jurisdictions as provided under the Constitution of each state hence there was room for judicial interference.

[49] The defendants also cited the Federal Court's decision in *Ting Tiong Choon* (*supra*). The subject matter is whether the disqualification of an assemblyman falls under the jurisdiction of the Dewan or the Election Court and whether the voluntary acquisition of foreign citizenship applies as a ground to disqualify an assemblyman pre-election and post-election. However, both the majority and minority judgments do not dispute on whether the assemblyman is disqualified on the ground of voluntary acquisition of foreign citizenship, but merely on whether such disqualification occurred before or after the nomination for the election.

[50] Undeniably, the Federal Court in *Ting Tiong Choon* (*supra*) had also interpreted the wordings of the Sarawak State Legislature and decided its applicability on the relevant assemblyman before deciding whether the decision by the Dewan fell within the privilege conferred by art. 72 of the FC.

[51] It is therefore clear that this Honourable Court needs to only interpret art. 14A of the PSC and decide its applicability to the plaintiffs' situation.

[52] If this Honourable Court decides that the interpretation of art. 14A of the PSC and its applicability on the assemblymen are decisions under the exclusive jurisdiction of the State Legislative Assembly, it will cause undesirable and dangerous consequences. For example, a State Assembly may disqualify an assemblyman based on reasons that do not fit into the grounds of disqualification. This will not only defeat the purpose of setting out the grounds for disqualification in a State Constitution, but it will also threaten the doctrine of separation of powers and confer unfettered power and/or dictatorship to the State Assembly to disqualify any democratically elected assemblyman without justification.

[53] For instance, in *Hafarizam Harun* (*supra*), the Federal Court held that Selangor State Assembly was acting in excess jurisdiction of the Selangor State Constitution when it attempted to pass a resolution of contempt of court against the plaintiff, which was not provided in the State Constitution.

[54] Therefore, this Honourable Court should decide the applicability of art. 14A of the PSC on the plaintiffs prior to placing any consideration on art. 72 of the FC. Article 14A of the PSC does not apply to the plaintiffs. In any event, the facts will show that the plaintiffs' circumstances should not trigger art. 14A of the PSC, which involves the change of party or party switching. Article 14A(1)(a) of the PSC reads as follows:

A (a) having been elected as a candidate of a political party, he resigns or is expelled from, or ceases for any reason whatsoever to be a member of that party.

[55] There are two elements to suffice before this section is triggered:

B (i) the assemblyman must be elected as a candidate of a political party; and

(ii) the assemblyman must resign or be expelled from, or cease for any reason whatsoever to be a member of that party.

[56] For the reasons set out above, it is respectfully submitted that the encl. 1 should be allowed with costs.

C **Defendants' Submissions**

[57] All reliefs sought must be dismissed:

(i) both Bersatu assemblymen are not and never were members of PKR. They were always and remain to this day members of Bersatu. Both
D assemblymen were given the consent to use the logo of PKR during the election;

(ii) Bersatu candidates stood as members of Pakatan Harapan and that when Bersatu, as a political party left Pakatan Harapan, the assemblymen
E somehow ceased to be members of Pakatan Harapan;

(iii) as such, art. 14A(1)(a) is engaged. All reliefs claimed in must be dismissed. The reasons are irrelevant. Ultimately, if the language is clear, the court must be guided by its plain meaning. In *Iki Putra Mubarrak v. Kerajaan Negeri Selangor & Anor* [2021] 3 CLJ 465; [2021]
F 2 MLJ 323, Azahar Mohamed CJM said, at para. 106:

> As can be seen, the FC deliberately used specific language in describing the nature of the preclusion clause. In my opinion, the wordings of the preclusion clause are compellingly clear and unequivocal and admit of no other interpretation. The clause is as
G plain and clear as language can express it.

(iv) the amendments to the FC to include art. 49A (which excludes expulsion) by way of Constitution (Amendment) (No. 3) Act 2022 are irrelevant (the "Amending Act"). The *Gazette* which brought into force the Amending Act expressly excludes s. 6 of the Amending Act which
H replicates art. 49A in the Eighth Schedule.

(a) The Appointment of Date of Coming into Operation P.U.(B) 476/2022 states:

> IN exercise of the powers conferred by subsections 1(2) and (3) of the Constitution (Amendment) (No. 3) Act 2022 [Act A1663], the
I Yang di-Pertuan Agong appoints 5 October 2022 as the date on which the Act comes into operation except section 6.

(b) Section 6 concerns the amendment of the Eighth Schedule.

[58] As a starting point, art. 13 of the PSC lists down the grounds of disqualification for membership of the first defendant. This is identical to art. 48 of the FC.

[59] Article 14A of the PSC is a separate provision which states:

(1) Subject to this Article, a member of the Legislative Assembly shall vacate his seat if:

(a) having been elected as a candidate of a political party, he resigns or is expelled from, or ceases for any reason whatsoever to be a member of that party; or

(b) having been elected otherwise than as a candidate of a political party, he joins a political party.

(2) A member of the Legislative Assembly shall not be required to vacate his seat pursuant to this Article only by reason of:

(a) the dissolution or cancellation of the registration of his party; or

(b) his resignation from the membership of the party upon election as a Speaker.

(3) Notwithstanding anything contained in art. 13(5), a member of the Legislative Assembly who vacates his seat under this Article may seek re-election at any ensuing election.

(4) The Speaker shall notify the Election Commission upon the occurrence of a vacancy under this Article.

[60] This is similar to art. 49A of the FC which provides:

(1) Subject to the provisions of this Article, a member of the House of Representatives shall cease to be a member of that House and his seat shall become vacant immediately on a date a casual vacancy is established by the Speaker under Clause (3) if:

(a) having been elected to the House of Representatives as a member of a political party:

(i) he resigns as a member of the political party; or

(ii) he ceases to be a member of the political party; or

(b) having been elected to the House of Representatives otherwise than as a member of a political party, he joins a political party as a member.

(2) A member of the House of Representatives shall not cease to be a member of that House pursuant to this Article only by reason of:

(a) the dissolution or cancellation of the registration of his political party;

(b) his resignation from the membership of his political party upon election as a Speaker; or

(c) the expulsion of his membership of his political party.

A (3) Whenever the Speaker receives a written notice from any member of the House of Representatives on the occurrence of a casual vacancy among the members of the House of Representatives under this Article, the Speaker shall establish that there is such a casual vacancy and notify the Election Commission accordingly within twenty-one days from the date he received the written notice.

B (4) For the purposes of holding an election under art. 54, such casual vacancy shall be filled within sixty days from the date the Election Commission receives the notification from the Speaker.

[61] The key difference is that art. 49A of the FC excludes expulsion as a C ground for vacating a member's seat.

(i) however, in both provisions, the seat of the members becomes vacant on the occurrence of any of the events specified in the provision;

(ii) in both provisions, the Speaker is then tasked to notify the Election Commission of such an event. The only the difference is that for D art. 49A of the FC, the Speaker must wait for a written notice from any member of the House of Representatives and must then write to the Election Commission within 21 days; and

(iii) article 14A of the PSC does not require the second defendant to receive E any such written notice nor does it provide a timeline for the second defendant to notify the Election Commission.

[62] The provisions place the obligation on the Speaker to notify the Election Commission. Thus, the decision maker is the Speaker. The decision of the Federal Court in *Teng Chang Khim* (*supra*) is instructive.

F (i) in that case, the Speaker of the Selangor State Legislative Assembly declared the seat of the respondent vacant due to his absence from the assembly meetings for a period of six months. The Speaker then notified the Election Commission of the vacancy. No decision of the assembly was taken on this matter. Raus Sharif PCA said:

G [9] On 19 January 2011, the Speaker declared the seat for the N46 Pelabuhan Klang Constituency vacant due to Badrul's absence from the SLA Meetings for a period of six months without the leave of the Speaker, pursuant to art. 69 of the Selangor Constitution. The reason for the decision was later explained by the Speaker in a press H conference and in a statement issued by him.

[10] Thereafter, on 21 January 2011, the Speaker notified SPR of his decision of declaring the seat for the N46 Pelabuhan Klang Constituency vacant, and that in accordance with art. 70(5) of the Selangor Constitution, a vacant seat must be filled within sixty days from the date of the Speaker's decision.

I

(ii) for completeness, arts. 69 and 70(5) of the Constitution of the State of Selangor provided:

> LXIX. Jika seseorang ahli Dewan Negeri tidak hadir tanpa kebenaran Speaker pada tiap-tiap persidangan Dewan selama tempoh enam bulan, kerusinya hendaklah diisytiharkan kosong oleh Speaker. LXX(5) Sesuatu kekosongan luar jangka hendaklah diisi dalam masa enam puluh hari dari tarikh kekosongan itu berlaku.

(Similar to art. 52 of the FC)

(iii) the primary issue in that case was whether the decision of the Speaker could be challenged in court given that no decision was made by the Selangor State Legislative Assembly and as such, art. 72 of the FC does not apply. Article 72(1) of the FC provides:

> (1) The validity of any proceedings in the Legislative Assembly of any State shall not be questioned in any court."
>
> 8.4. The Federal Court decided that the Speaker can declare the seat vacant without bringing the matter to the Selangor State Legislative Assembly and that parliamentary privilege under art. 72, FC would equally apply to the Speaker's decision as if it was a decision of the House. Raus Sharif PCA said:
>
> > [35] Article 69 of the Selangor Constitution expressly provides the authority for the Speaker to declare a seat vacant if a member of the Legislative Assembly is absent without leave from every sitting for a period of six months. However, the provision is silent as to whether the declaration should be made by the Speaker during the proceedings of the assembly. The provision also does not impose any obligation on the Speaker to consult members of the legislative assembly before declaring a seat vacant.
> >
> > [36] The question is whether the Speaker's action in declaring Badrul's seat for the constituency of N46 Pelabuhan Klang vacant at a press conference was in exercise of his functions to regulate the internal affairs of the SLA and was immune from challenge in court. Our answer is in the affirmative. Firstly, the declaration was purely made within the parameters set out by art. 69 of the Selangor Constitution. Secondly, the declaration was inevitably connected to the essential business of the SLA and was made in the performance of the Speaker's essential function as a Speaker
> >
> > [37] Therefore, we are of view that the Speaker in the present case had acted legally under art. 69 of the Selangor Constitution in declaring Badrul's N46 Pelabuhan Klang Constituency seat vacant. The course taken by the Speaker is non-justiciable as it is protected by art. 72(1) of the Federal Constitution and paras. 2-3 of the Schedule to art. 77 of the Selangor Constitution.

[63] The said decision was cited with approval by the Federal Court in *Ting Tiong Choon* (*supra*). The majority of the court, speaking through Abdul Rahman Sebli FCJ, decided that any decision of the assembly cannot be questioned by the courts by reason of art. 72 of the FC. Abdul Rahman Sebli FCJ said:

> [76] Which brings me to art. 72(1) of the Federal Constitution, a provision that gives immunity to the validity of proceedings in the Dewan from judicial interference. This is what the article says: The validity of any proceedings in the Legislative Assembly of any State shall not be questioned in any court.
>
> [77] Nothing can be clearer than that. Being a provision of the supreme law of the Federation, art. 72(1) prevails over any written law passed after Merdeka Day that is inconsistent with it: see art. 4(1). If even a written law passed by Parliament or the State Legislature cannot prevail over art. 72(1) if it is inconsistent with the provision, it stands to reason that no common law doctrine can prevail over the constitutional provision.
>
> [78] The majority did not seriously and adequately direct their mind to this article because, as mentioned earlier, the focus of their attention was on the issue of jurisdiction. Article 72(1) of the Federal Constitution deals with the issue of justiciability which had been definitively decided by this court in *Teng Chang Khim (appealing as Speaker of Selangor State Legislative Assembly) v. Badrul Hisham bin Abdullah & Anor* [2017] 5 MLJ 567; [2017] 9 CLJ 630. The case concerns the decision of the Speaker of the Selangor State Assembly to declare vacant a seat because of a State Assemblyman's absence from sittings of the Assembly for six months without the Speaker's leave. At para 23 this is what the court said:
>
> > Thus, there can be no doubt that the business of Parliament and the State Legislative Assemblies are immune from judicial interference. The courts have no power to interfere with the internal management of Parliament or any State Legislative Assembly. This immunity arises from the doctrine of separation of powers between the three principal organs of government, namely, the Executive, the Legislature and the Judiciary.
>
> [79] In concluding, the court held at para 51:
>
> > In conclusion, we are of the view that in the present case, the Speaker was acting within the limits of the power given to him under art. 69 of the Selangor Constitution when he declared the N46 Pelabuhan Klang Constituency seat vacant. Even though the declaration was made outside the SLA proceedings, it was inevitably connected with the essential business of the SLA, made within the parameters set out by art. 69 of the Selangor Constitution, and was made to regulate the internal affairs of the SLA. Consequently, we rule that the Speaker's act is non-justiciable and the Speaker is entitled to the protection of parliamentary privilege enjoyed by the SLA as provided for under art. 72(1) of the Federal Constitution.

[80] The court reiterated its earlier decision in *Teng Chang Khim (Chairman of Select Committee on Competence, Accountability and Transparency and Chairman of Commitee of Privilege Selangor State Assembly) & Ors v. Dato' Raja Ideris bin Raja Ahmad & Ors* [2014] 4 MLJ 12; [2014] 3 CLJ 173 that art. 72(1) of the Federal Constitution provides an 'absolute immunity' against judicial review of proceedings in the Selangor Legislative Assembly.

[81] *Lim Cho Hock v. Speaker, Perak State Legislative Assembly* [1979] 2 MLJ 85 is another case on point. In that case, the Speaker applied to set aside the originating summons on the ground that the court had no jurisdiction to hear the assemblyman's application to, *inter alia*, declare an assemblyman's seat (who happened to be the Speaker himself) vacant. In disallowing the claim, Eusoffe Abdolcader J (as he then was) held:

> *In the light of these constitutional provisions, it is clear that the two matters raised in these proceedings are for the Assembly to decide and within its exclusive jurisdiction, and not for the courts to determine. Under the lex et consuetudo parliament, the Assembly has control over its proceedings, procedure and members and may decide questions as to the qualifications and disqualifications. The provisions in the Federal and State Constitutions I have discussed crystallise and encapsulate this important principle of non-justiciability of its intra-mural activities in the courts which may perhaps be appropriately termed the Bradlaugh principle, highlighted in the Bradlaugh v. Gosset* (1984) (QBD) 271.

[82] It needs to be mentioned also that this court in *Teng Chang Kim* (at para 78 above) had affirmed as correct the decision of the High Court in *Fan Yew Teng v. Government of Malaysia* [1976] 2 MLJ 262 where Chang Min Tat J (as he then was) held:

> The issue in his application is the right of the plaintiff to sit in the Dewan Ra'ayat and, in my view and with respect, this issue comes fully within the compass of art. 53 and art. 63. The issue therefore involves the proper and reasonable construction of these Articles. The language is plain and unambiguous. Giving the words therein their plain and grammatical meaning, the decision on this issue is for the House to take, it is final when taken and the validity of the proceedings cannot be questioned in any court ...
>
> On this construction, I must necessarily go on to hold that this court cannot interfere with the right of the Dewan to decide the question of the plaintiff becoming disqualified for membership or the corresponding right of the Dewan under the proviso to art. 53 to decide ...

[83] There the High Court was dealing with art. 53(1) of the Federal Constitution which is identical though not similar word for word with art 19(1) of the Sarawak Constitution. It reads:

> 53(1) If any question arises whether a member of a House of Parliament has become disqualified for membership, the decision of that House shall be taken and shall be final:

A Provided that this Article shall not be taken to prevent the practice of the House postponing a decision in order to allow for the taking or determination of any proceedings that may affect the decision (including proceedings for the removal of the disqualification).

B [84] The effect of art. 72(1) of the Federal Constitution on the decision by the Dewan to disqualify and remove the respondent from the House is that the decision 'shall not be questioned in any court'. Thus, so long as the Dewan had acted within the limits of its power, the court would be in breach of art. 72(1) of the Federal Constitution if it interfered with the exercise of that power. The court is therefore barred from questioning C the validity of the decision taken by the Dewan under art. 19(1) of the Sarawak Constitution. The common law doctrine of separation of powers does not and cannot prevail over a constitutional provision like art. 72(1) of the Federal Constitution.

[85] The moving of the Ministerial Motion to decide on the qualification D of the respondent as a member of the Dewan, the attendant debate on the motion and the voting on the motion were all matters that came within the core business of the Dewan. The whole proceedings of the Dewan therefore attracts privilege and must remain inviolable: see *R v. Chaytor* [2011] 1 AC 684; *Teng Chang Kim* (para 195 above); *Yang Dipertua, Dewan Rakyat & Ors v. Gobind Singh Deo* [2014] 6 MLJ 812.

E [86] Had the majority applied their mind adequately to the issue of justiciability, they would have decided that the decision of the Dewan to disqualify and remove the respondent from the House, taken as it was under and in accordance with art. 19(1) of the Sarawak Constitution, was immune from judicial interference by operation of art. 72(1) of the Federal Constitution. (emphasis added)
F

[64] In summary, applying the said Federal Court decisions:

(i) the constitutional scheme under the Penang Constitution makes it clear that it is for the second defendant to decide whether arts. 14A applies to the plaintiffs;

G

(ii) this is within his exclusive jurisdiction. Article 72(1) of the FC applies to any decision made by him; and

(iii) the court cannot predetermine this issue as the Penang Constitution makes it clear that it is for the second defendant to make a determination H first.

[65] In short, applying the *ratio* in *Teng Chang Khim* (*supra*) and *Ting Tiong Choon* (*supra*), the applicability of art. 14A of the PSC is within the exclusive jurisdiction of the second defendant and cannot be interfered with by the courts. Even if the courts can intervene (no concession is made), this can only I be done after a decision is made by the second defendant. In the present case, no decision has been made by the second defendant.

[66] In view of the foregoing, the defendants humbly pray that encl. 1 be dismissed with cost.

The Findings Of The Court

[67] Based on the summary of the plaintiffs' argument, it is clear that the plaintiffs are requesting this court to apply the amendment of s. 14A of the PSC based on the fact that the plaintiffs are still the Bersatu's members and this fact should be evaluated by the court in interpreting art. 14A of the PSC whether it applies to the plaintiffs. The plaintiffs also request that this court gives effect to this amendment in line with the amendment to art. 49A of the FC. The plaintiffs argued that the court should look at the facts of this case and not just look at the decision of the Federal Court. In the order, this court should decide and dispose based on the provisions of the law, and this clearly does not prevent this court from giving orders including injunctions or prohibitions for any submission of a motion by the defendants to deprive the plaintiffs of his position.

[68] The defendants' argument is that this court should give full effect to the amendment and apply to everyone including the plaintiffs in this case because the amendment has been affirmed and binding on this court. The court also cannot interpret otherwise and must follow the encl. 1 and can no longer give orders outside the jurisdiction of this court.

[69] In this case, the plaintiffs requested this court to interpret art. 14A of the PSC. Of course, the court has jurisdiction to decide this matter depending on the judgment from the Federal Court and to say that this court has the authority to decide as argued by the parties even though it is not pleaded in the encl. 1 is not correct. This is because this case involves the jurisdiction of the court and also the jurisdiction of the defendants. The court is careful with the arguments of both parties and evaluates them.

[70] What guidance does the court have, except referring back to encl. 1. This court is bound to decide based on what was filed in encl. 1. This is because, if the plaintiffs are allowed to wander and deviate from the pleadings, it is not fair to the defendants. The court and the defendants from the very beginning have referred to the encl. 1.

[71] A large part of the plaintiffs' argument is related to the interpretation of art. 14A of the PSC itself, which is said not to apply to the plaintiffs, but the fact is that the Bersatu had left the coalition, instead of the plaintiffs "hopped" from their party. The defendants argue that art. 14A of the PSC does not apply to the plaintiffs. This court acknowledged it, but all those facts only become relevant when it is argued in the State Assembly later.

[72] The court will not interpret whether art. 14A of the PSC is oppressive or prevents the plaintiffs' freedom of speech or from arguing in the State Assembly. This is because the plaintiffs' pleaded question was "whether art. 14A is contrary to art. 10(1)(c) of the FC" which has been answered by

A the Federal Court. What else is left for this court to interpret otherwise? This court will no longer touch on basic structure as argued by learned plaintiffs' counsel.

[73] This court agrees with learned defendants' counsel that the reliefs requested are mainly irrelevant (or premature) because it has already been B decided and there is also, future one which cannot be prayed because the rights are fully vested in the defendants. This court does not have the jurisdiction and power to do so at this time and it is only can be applied after the decision is made by the defendants under art. 14A of the PSC.

C The facts related to the plaintiffs' qualifications are premature to be argued whether they are subject to art. 14A of the PSC. The Federal Court also clearly said that the court will only look at the question related to art. 14A of the PSC whether it is valid or not and not whether it is related to the plaintiffs or not.

D **[74]** The plaintiffs in their arguments did not focus on this issue but rather changed the direction of the case by requesting this court to examine the fact of the case as their main argument. They also applied for an order that touches the jurisdiction of the State Assembly. The reasons for the expulsion are irrelevant at this stage.

E **[75]** Based on the facts of this case, even though the court has the jurisdiction, this court will refer to the prayed reliefs instead of interpreting and allowing any application at the submissions stage. In *Lim Guan Eng v. Ruslan Kassim & Another Appeal* [2021] 4 CLJ 155; [2021] MLJU 225, held that:

F > [159] This must not be countenanced by this court as it will set a dangerous precedent. In *Melawangi Sdn Bhd v. Tiow Weng Theong* [2020] 3 MLJ 677, this is what this court had to say on the matter:
>
> > As we said in the recent case of *Noor Azman Azami v. Zahida bt Mohamed Rafik* [2019] 3 CLJ 295 as a matter of broad general G principle, a party is not precluded from raising a new issue in an appeal because this court has the power and discretion to permit a party to argue a ground which falls outside the scope of the question regarding which leave to appeal had been granted in order to avoid a miscarriage of justice (see: *Menteri Sumber Manusia v. Association of Bank Officers, Peninsular Malaysia* [1999] 2 MLJ 337; H [1999] 2 CLJ 471 and *Datuk Harris Mohd Salleh v. Datuk Yong Teck Lee (sued in his personal capacity and as an officer of the second respondent) & Anor* [2017] 6 MLJ 133; [2018] 1 CLJ 145. We must add here that the discretion must, however, be exercised judiciously and sparingly, and only in very limited circumstances in order to achieve the ends of justice. It has to be performed with care after I giving serious considerations to the interests of all parties concerned.

[76] This court will only refer to the reliefs in encl. 1 as follows:

Reliefs Prayer 1

There is no need for this court to interpret otherwise because the Federal Court has already decided. Since the Federal Court has decided that art. 14A of the PSC is valid, therefore this court is bound by the decision. In the case of *Syed Iskandar Syed Jaafar v. Kerajaan Malaysia & Ors* [2023] 1 CLJ 642 held that:

> [35] However, my problem is not in recognising the difficulty of the issues raised in question (ii). My problem is the effect of referring the question is to put this OS to an end. There is nothing further for me to deliberate and determine in the OS. The question of bringing the dispute to a speedy and economical end within the meaning of s. 84(2) of the CJA no longer arises.
>
> [36] In short, once the Federal Court answers question (ii), this OS will be finally determined. Although procedurally the matter is to be remitted to this court, practically, there is nothing to be deliberated anymore. I am bound by the doctrine of *stare decisis*, and once it is remitted to this court, for all intents and purposes, the rights of the parties in this OS would be finally decided once question (ii) is answered by the Federal Court.
>
> [37] The exercise of my discretion can only be made if the question, once answered by the Federal Court, would assist me in determining the main OS.
>
> ...
>
> [44] However, as I alluded to earlier, and based on the factual matrix and the nature of question (ii), once the Federal Court answered it, this OS would be finally disposed of. I am bound by the answer given by the Federal Court. Even if there is an appeal against my decision, the Court of Appeal too would be bound by the answer. The right of appeal would therefore be nugatory.

Therefore, Prayer 1 is dismissed.

Prayer 2

This court cannot make any decision that will exceed the jurisdiction of this court. Any issue related to the eligibility or disqualification of a member of State Assembly who has been elected through a valid election process is under the jurisdiction of the State Assembly as stated in the State Constitution. In this case, it is under art. 13 of the PSC. For this case it involves art. 14A of the PSC which is the first defendant to make decisions. In short, applying the *ratio* in *Teng Chang Khim* (*supra*), the applicability of art. 14A of the PSC is within the exclusive jurisdiction of the second defendant and cannot be interfered with by the courts. Even if the courts can intervene, this can only be done and referred to the court after a decision is made by the second defendant. In the present case, no decision has been made by the second defendant.

Therefore, prayer 2 is dismissed.

Prayer 3

This court cannot grant an injunction against first defendant which has the effect of preventing the defendants from exercising the powers and jurisdiction provided to them under the PSC. The Federal Court in the case of *Teng Chang Khim* (*supra*) at p. 637 (CLJ); p. 574 (MLJ) held as follows:

> [23] Thus, there can be no doubt that the business of Parliament and State Legislative Assemblies are immune from judicial interference. *The courts have no power to interfere with the internal management of Parliament or any State Legislative Assembly. This immunity arises from the doctrine of separation of powers between the three principal organs of government, namely, the executive, the legislature and the judiciary*. (emphasis added)

(see *Tun Dr Mahathir Mohamad & Ors v. Datuk Azhar Azizan Harun & Ors* [2021] 3 CLJ 852; [2021] 9 MLJ 224).

Therefore, prayer 3 is dismissed.

Prayer 4

This court cannot grant an injunction which has the effect of preventing the second defendant from exercising the powers under the PSC.

The Federal Court in the case of *Teng Chang Khim* (*supra*) at p. 637 (CLJ); p. 574 (MLJ) held as follows:

> [23] Thus, there can be no doubt that the business of Parliament and State Legislative Assemblies are immune from judicial interference. The courts have no power to interfere with the internal management of Parliament or any State Legislative Assembly. *This immunity arises from the doctrine of separation of powers between the three principal organs of government, namely, the executive, the legislature and the judiciary*. (emphasis added)

(see *Tun Dr Mahathir Mohamad & Ors v. Datuk Azhar Azizan Harun & Ors* [2021] 3 CLJ 852; [2021] 9 MLJ 224).

Therefore, prayer 4 is dismissed.

Prayer 5

This court cannot prevent the second defendant from referring or tabling any motion related to the plaintiffs because this will interfere with the defendant's affairs under the PSC. *This immunity arises from the doctrine of separation of powers between the three principal organs of Government, namely, the Executive, the Legislature and the Judiciary*. (emphasis added)

Therefore, prayer 5 is dismissed.

Prayer 6

No order.

Prayer 7

No order to costs.

Conclusion

[77] At this stage, the court does not make any means or speculation as to what the parties' next actions will be. This court only decides on this application based on the affidavit and arguments that are before the court without considering other factors. The court refers to the case of *Yew Wan Leong v. Lai Kok Chye* [1990] 1 CLJ 1113; [1990] 1 CLJ (Rep) 330; [1990] 2 MLJ 152, in the following terms:

> It is not the duty of the court to make out a case for one of the parties when the party concerned does not raise or wish to raise the point. In disposing of a suit or matter involving a disputed question of fact, it is not proper for the court to displace the case made by a party in its pleadings and give effect to an entirely new case which the party had not made out in its own pleadings. The trial of a suit should be confined to the pleas on which the parties are at variance.

[78] In the case of *Ribaru Bina Sdn Bhd & Anor v. Bakti Kausar Development Sdn Bhd & Anor* [2007] 1 CLJ 552, the court held that:

> [5] To raise triable issues by way of submission on a point not raised in a defence or an affidavit would not, in our judgment, meet the requirements of procedural fairness which is the essence of any litigation. In the present case, we are of the opinion that the learned judge ought not to have taken any notice of the submission on the privity of contract point as it had not been raised in the affidavit or the defence. There is therefore merit in the plaintiffs complaint on this part of the case.

[79] In *SPNB Aspirasi Sdn Bhd lwn. Chimonief Sdn Bhd* [2022] 3 CLJ 581; [2022] MLJU 166, the Court of Appeal held that:

> [53] Dalam membuat keputusan, mahkamah adalah terikat untuk hanya memutuskan kes berdasarkan pliding dan tidak boleh mengetepikan pliding pihak-pihak. Kedua-dua pihak terikat dengan parimeter pliding masing-masing (lihat *Janagi v. Ong Boon Kiat* [1971] 2 MLJ 196; *Pacific Forest Industries Sdn Bhd & Anor v. Lin Wen-Chih & Anor* [2009] 6 MLJ 293; *RHB Bank Bhd (substituting Kwong Yik Bank Bhd) v. Kwan Chew Holdings Sdn Bhd* [2010] 2 MLJ 188; *Aseambankers Malaysia Berhad & Ors v. Shencourt Sdn Bhd & Anor* [2014] 4 MLJ 619).
>
> [54] Kembali kepada kes sekarang, kami menyatakan bahawa HMT tidak boleh mengabaikan pliding plaintif. Berdasarkan pliding plaintif, HMT hanya boleh membuat pentaksiran ganti rugi bagi kehilangan keuntungan di perenggan 16(f) berdasarkan Kos Tanah sahaja.
>
> [55] Terdapat banyak kes yang diputuskan yang menyatakan bahawa jika pematuhan ketat pliding diabaikan, maka mahkamah akan dilihat seolah-olah mereka-reka atau mewujudkan suatu kausa tindakan bagi satu pihak

dan pada masa yang sama, berlaku tidak adil kepada pihak yang lain, dan keputusan yang dibuat berdasarkan isu yang tidak diplid boleh diketepikan. Mahkamah Persekutuan dalam *RHB Bank Bhd*, *supra* menegaskan:

> [33] Second, the proposition of the Court of Appeal was not even pleaded by the respondent. The respondent's cause of action against the appellant was for breach of contract. Nowhere in the respondent's pleading, expressly or by implication, can we detect a claim for breach of a joint venture agreement arising out of a fiduciary duty placed upon the appellant in the capacity as principal of an agent. It is a cardinal rule in civil litigation that the parties must abide by their pleadings. This is trite as can be seen from the decision of this court in *Menah Sulong v. Lim Soo & Anor* [1970] 1 MLRA 1; [1983] CLJ (Rep) 263; [1983] 1 CLJ 26 where Ong Hock Thye CJ said:
>
> > I think it is necessary in this case to emphasise once again that the courts should give their decision in strict compliance with the pleadings. As Lord Radcliffe said in *Esso Petroleum Co Ltd v. Southport Corporation* [1956] 2 WLR 81.91.
> >
> > If an Appellate court is to treat reliance as pedantry or mere formalism I do not see what part they play in out trial system.
>
> [34] In fact, the Court of Appeal itself has reiterated this in *Amanah Butler (M) Sdn Bhd v. Yike Chee Wah* [1997] 1 MLRA 143; [1997] 1 MLJ 750; [1997] 2 CLJ 79; [1997] 2 AMR 1653 where Gopal Sri Ram JCA (as he then was) said:
>
> > It is trite law that a party is bound by its pleadings.
>
> [35] On this, we would like to add that it is not the duty of the court to invent or create a cause of action or defence under the guise of doing justice for the parties lest it be accused of being biased towards one against the other. The parties should know best as to what they want and it is not for the court to pursue a cavalier approach to solving their dispute by inventing or creating cause or causes of action which were not pleaded in the first place. Such activism by the court must be discouraged otherwise the court would be accused of making laws rather than applying them to a given set of facts.

[56] Dalam *Projek Lebuh Raya Utara-Selatan Sdn Bhd v. Kim Seng Enterprise (Kedah) Sdn Bhd* [2013] 5 MLJ 560, Mahkamah Rayuan memutuskan:

> [18] What this amounts to is this. That the court is not entitled and should not decide a suit on an issue which is not pleaded. In short, the trial of the suit must be confined to the pleadings (*Yew Wan Leong v. Lai Kok Chye* [1990] 2 MLJ 152 (SC), at p. 154) and the pleadings operate to effectively define and delimit with absolute clarity and precision the real matters in controversy between the parties. In this way, the parties could prepare their respective cases ad the court too will adjudicate on those issues and no more (*Asia Hotel Sdn Bhd v. Malayan Insurance (M) Sdn Bhd*

[1992] 2 MLJ 615; *S Manickam & Ors v. Ismail bin Mohamad & Ors* [1997] 2 MLJ 90; *Narayanan v. Kannamah* [1993] 3 MLJ 730; *Anjalai Ammal & Anor v. Abdul Kareem* [1969] 1 MLJ 22 (FC); *Muniandy & Anor v. Muhammad Abdul Kader & Ors* [1989 2 MLJ 416 (SC), at p 418; *Wisma Punca Emas Sdn Bhd v. Dr Donal RO' Holohan* [1987] 1 MLJ 393 (SC); *Gimstern Corporation (M) Sdn Bhd & Anor v. Global Insurance Co Sdn Bhd* [1987] 1 MLJ 302 (SC); and *Tan Ah Chim & Sons Sdn Bhd v. Ooi Bee Tat & Anor* [1993] 3 MLJ 633).

[19] It is a correct statement of the law to state that where the case has been decided on an issue that is not raised in the pleadings, the judgment can be set aside forthwith.

[57] Juga dalam *Aseambankers Malaysia Berhad*, *supra*, di muka surat 648 diputuskan bahawa:

It is also salutary to mention that when the trial court decides on an issue that is not pleaded, the judgment can be set aside.

[80] The Federal Court in *PCP Construction Sdn Bhd v. Leap Modulation Sdn Bhd; Asian International Arbitration Centre (Intervener)* [2019] 6 CLJ 1; [2019] 4 MLJ 747 held:

[41] The courts of justice are the bulwark of a nation. Alexander Hamilton famously recognised, in the doctrine of the separation of powers, *that the Legislature controls money, the executive controls force and the Judiciary controls nothing. It is on public confidence that the Judiciary depends, for the general acceptance of its judicial decisions, by both citizens and the Government. The public conforms to the decisions of the Judiciary, because they respect the concept of judicial power and the judges who exercise such power*.

[42] *Therefore, the trust and confidence of the people in the judicial system to deliver impartial justice comprises the very foundation of the Judiciary*.

(emphasis added)

[81] Based on the entire facts of this case and also based on the decision of this case itself at the level of the Federal Court, this court refers and follows the cases of *Teng Chang Khim* (*supra*), *Ting Tiong Choon* (*supra*), *Dato' Dr Zambry* (*supra*) and *Hafarizam* (*supra*) as the basis for this entire decision. This court also referred to the precedent in the case of *Jaafra Ab Lateh v. Mohd Irwan Abdullah* [1996] 2 SLR 201, the court held that:

That before declaratory relief will be granted it must be shown as follows:

(1) the court must have jurisdiction and power to award the remedy. If there is no jurisdiction, there is no power (*Lim Choo Hock v. Government Of The State Of Perak & Ors* [1980] 2 MLJ 148);

(2) as the declaration is a discretionary remedy, it must be justified under the circumstances of the case;

(3) the plaintiff must have *locus standi* to bring the action;

(4) there must exist a real controversy for the court to resolve (see *Tan Keat Seng Kitson v. Kerajaan Malaysia* [1996] 2 MLJ 454; *Lee Phet Boon v. Hock Thai Finance Corp Bhd* [1999] AE MJ 0001; [1994] MLJ, 448, HC);

A (5) the person whose interest is to be affected should be before the court (*Abdul Rahim Aki v. Krubong* [1995] 3 MLJ 417)

(see *Md Su'aimy Wahab lwn. Abdul Rahman Mohamad & Yang Lain* [2022] 1 LNS 1199; [2022] MLJU 1171)

B **[82]** In cases involving such disputes, the guidance from the Federal Court must always be followed and binding, that is, the court must always give recognition to the doctrine of separation of powers. The courts have no power to interfere with the internal management of Parliament or any State Legislative Assembly. This immunity arises from the doctrine of separation of powers between the three principal organs of Government, namely, the C Executive, the Legislative, and the Judiciary If these three branches are left unchecked, there will be a clash that will destroy the doctrine of separation of powers which will affect the freedom of the three to act according to their respective jurisdiction.

D **[83]** This court would like to place in the court record that the arguments of both parties have assisted this court in deciding this case. During the proceedings, both parties gave their respective arguments to be considered. The court at the same time has also resolved all the issues by getting professional responses from both parties as decided in the case of *Kordial Kor Kundang Singh v. EC Controlled Demolition Sdn Bhd & Ors* [2002] 6 CLJ 295; E [2002] 7 MLJ 386, held that:

> The conduct and responsibilities of these hardworking advocates and solicitors are governed by the Legal Profession (Practice and Etiquette) Rules, 1978 *vide* PU (A) 369/78. Foremost and of great importance to remember is this. That the counsel's principal duty is to the court and this F would be followed by his duty to his client (*Saipem (M) Sdn Bhd & Anor v. AG & P (M) Sdn Bhd (In liquidation) & Ors* [1996] 1 MLJ 239). *My role as a judge is quite simple. It is to adopt an objective stand in order to find out the truth and at the same time to do justice according to law. All I need do is to listen to the evidence as well as listen to the arguments of counsel from both sides. When necessary to clear up any confusion, I am empowered to ask questions of witnesses* G *as well as their counsel* (*Jones v. National Coal Board* [1957] 2 QB 55; [1957] 2 All ER 155 (CA)). But of late, some lawyers are not too happy if a judge asks questions [2002] 7 MLJ 386 at 399 to clear up any confusion. All judges ask pertinent questions in the course of adjudicating cases. In the context of this case, I exercised restraint. I merely listened attentively and wrote copiously. (emphasis added)

H

Pronouncement

[84] In a nutshell, the plaintiffs have failed to prove his case against all the defendants. Therefore, encl. 1 is dismissed with no order to costs.

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